SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 344

COMPANIA DE VAPORES INSCO, S. A., THE BALOISE MARINE INSURANCE CO., LTD., THE CHRYSLER CORPORATION, COMPANIA IMPORTADA DE AUTOS Y CAMIONES, S. A., AND COMPANIA DE AUTOS Y TRANSPORTES, S. A.,

Petitioners,

versus

MISSOURI PACIFIC RAILROAD COMPANY, GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, AND TEXAS PACIFIC-MISSOURI PACIFIC TERMINAL RAILROAD OF NEW ORLEANS,

Respondents.

OPPOSITION TO GRANTING PETITION FOR CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

May It Please the Court:

Petitioners would have Your Honors reverse the United States Court of Appeals, Fifth Circuit, and the Honorable Herbert W. Christenberry, Judge of the United States District Court for the Eastern District of Louisiana, New Orleans Division, solely on the ground that **as a matter of law** certain "admissions" made by two employees of one of the respondents (not by either of respondents) were binding upon the Trial Court, as well as the Appellate Court, and conclusively showed such negligence as not to excuse respondents from the effects of an Act of God which otherwise would have relieved respondents from liability for the damages claimed by petitioners.

The so-called admissions were only a part of the voluminous evidence that was considered by the Trial Judge. The Trial Judge had only two questions to answer in order to reach a decision in this cause, namely:

1. Was there an Act of God of sufficient severity to release respondents from liability as common carriers?
2. If there was such an Act of God were respondents guilty of any negligence that contributed to the Act of God in bringing about the damages which form the basis of petitioners' claims?

The Trial Judge found that the damage resulted directly and solely from a weather disturbance which was

either a small tornado or a line squall with tornadic characteristics; that this disturbance was unheralded, struck quickly and with unusual intensity that exceeded 90 miles per hour and probably exceeded 100 miles per hour. (Tr. pp. 679-81). This conclusion was not disturbed by the Appellate Court; and petitioners do not now claim that this finding was erroneous, as a matter of law.

The Trial Judge also found that at the time of the severe weather disturbance, the docks and warehouses of respondents, in which were located the vehicles the damage to which forms the basis of this action, were sound and in good order, repair and condition, the same having been maintained by repairs and replacements when necessary, by a regularly employed crew of qualified laborers under the supervision of competent foremen and engineers; that from a reasonably prudent inspection there was no apparent deterioration; and that the warehouses had withstood all other wind disturbances. (Tr. p. 681). This finding was likewise not disturbed by the Appellate Court. There is substantial evidence in the record to support both findings; but petitioners would have this Court ignore all other evidence except certain "admissions" of two employees of one of the respondents.

It is opponent's position that the so-called admissions of these two witnesses (Lytle and Pennybaker) do not show the alleged negligence. Mr. Lytle merely "estimated" that the structure involved would withstand a windstorm of 90 miles an hour; but he also said that to his knowledge the structure had withstood winds that were considerably stronger. (Tr. p. 411).

Mr. Pennybaker estimated the "general condition of the wharf" (including sub-structure, decking and superstructure extending several thousand feet in length and several hundred feet in depth) at what he would call "about 75%". However, he was not worried about the superstructure (Tr. p. 453); and the wharves were under constant supervision and were repaired whenever any deficiencies manifested themselves. (Tr. p. 451).

Petitioners have plucked two isolated statements out of the rather extensive testimony of two of respondents' witnesses. The Trial Judge was not as a matter of law obligated to consider only these statements, but had the right to and did consider **all** of the testimony of these two witnesses, as well as the statements and testimony of **all** of the other witnesses and the voluminous testimony of evidence that was offered at the trial.

Quite obviously, the Trial Court felt that the two isolated statements in the light of all of the other evidence did not conclusively show negligence on the part of respondents; and the Appellate Court quite obviously found that the record includes substantial evidence to support this finding.

It is opponents' contention that the Trial Judge had the right to consider all of the evidence before deciding the factual question of whether or not respondents were guilty of any negligence. The Trial Judge, after hearing all of the witnesses, concluded that the respondents sustained what he considered to be their burden of proving absence of negligence.

The Appellate Court specifically considered whether or not the Trial Judge had substantial evidence upon which to base his conclusions. The Appellate Court specifically considered the so-called admissions of the two employees (see pages 24 and 25 of petitioners' application) and concluded that there was no error in the findings of the Trial Court that respondents' warehouses were sound and that their condition did not in any wise contribute to the damage and destruction of the warehouses by the severe weather disturbance of April 4, 1952.

The evidence as a whole convinced the Trial Judge that respondents' warehousing facilities were sound; that they had withstood all previous storms, hurricanes, and other weather disturbances in the New Orleans area, including the 1947 hurricane cited by petitioners; that the severity of the wind that damaged and destroyed respondents' warehouses was unprecedented in the New Orleans area; and that respondents could not have taken any reasonable precautions to protect its warehouses and petitioners' property from the tornado, or line squall with tornadic characteristics, which caused the damage.

The only real question involved in this case is whether or not respondents were negligent and thereby contributed to the Act of God which destroyed petitioners' property. The determination of such issue involved an analysis and evaluation of factual matters rather than the resolution of legal conflicts.

Since only a factual matter is presented for review, the present case is not one in which this Court should exercise its discretionary power of review by certiorari. This

is not a case that involves any serious general matters. (See *In re Woods, et al.*, 143 U. S. 202, 12 S. Ct. 417, 36 L. Ed. 125).

The application herein should be properly denied upon the authority of the following decisions:

Houston Oil Company of Texas v. Goodrich, et al., 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385, wherein this Court held:

> "As grounds for granting the writ petitioners alleged that the trial court erred in refusing to submit to the jury (1) whether the deed first dated was in fact executed; (2) whether it was presented for record before execution of the later one; (3) whether vendee in the prior deed was a bona fide purchaser for value; (4) whether the prior deed was forged; and (5) whether the action was barred by the three year Statute of Limitations. **The propriety of submitting these matters depended eventually upon an appreciation of the evidence.** Having heard it all, the trial court concluded there was not enough in support of any one of petitioners' above-stated claims to warrant a finding in their favor, and the Circuit Court of Appeals reached the same result. 226 Fed. 434, 141 C. D. A. 264.
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> **"The record discloses no sufficient reason within the rule long observed why we should review the judgment below.** Forsyth v. Hammond, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 1095). (Emphasis added).

N.L.R.B. v. Pittsburg S. S. Co., 340 U. S. 498, 71 S. Ct. 453, 95 L. Ed. 479, wherein this Court said:

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place, we would find the record tilting one way rather than the other, though fair minded judges could find it tilting either way."

See also *Baker v. Schofield*, 243 U. S. 114, 37 S. Ct. 333, 61 L. Ed. 626; *W. J. McCahan Sugar Refining Company v. The Steamship Wildcroft*, 201 U. S. 378, 26 S. Ct. 467, 50 L. Ed. 794; *Boehmer v. Pennsylvania Railroad Co.*, 252 U. S. 496, 40 S. Ct. 409, 64 L. Ed. 680; and *General Talking Pictures Corporation v. Western Electric Co.*, 304 U. S. 175, 58 S. Ct. 849, 82 L. Ed. 1273, affirmed 305 U. S. 124, 59 S. Ct. 116, 83 L. Ed. 81.

Petitioners have not cited any authority for the alleged error upon which their application is based, except the case of *Memphis and Charleston Railroad Co. v. Samuel Reeves*, 77 U. S. (10 Wall.) 176, 19 L. Ed. 909.

This decision merely stands for the proposition that where a common carrier shows that damage resulted from an Act of God, it is exempt from liability unless a plaintiff proves that the common carrier was guilty of some negligence in not providing for the safety of the goods.

The Trial Judge did not follow the principle of the cited case. If he had, the petitioners would have been in a less favorable position before the Lower Court. On the contrary, in spite of the cited case, the Trial Judge required the common carriers (respondents) to disprove

negligence; and the fact that respondents discharged this burden merely emphasizes the extent to which the Trial Judge was convinced after considering all of the evidence.

By citing *Memphis and Charleston Railroad Co. v. Samuel Reeves, supra,* as their only authority in support of their application, petitioners necessarily concede that this case involves only a determination of facts, based upon all of the findings; and the purpose of this application is obviously in an effort to have this Court minutely examine all of the evidence for the purpose of concluding that the Trial Judge should have accepted petitioners' evidence rather than respondents' evidence; and that the Appellate Court should not have concluded that there is substantial evidence in support of the Trial Judge's conclusions!

It is respectfully submitted that there is no question involved in the present case which would justify the granting of petitioners' application; that this case involves purely a question of fact; and that it was the prerogative of the Trial Judge to determine the credibility of the witnesses and to evaluate the oral and documentary evidence.

While petitioners present an argument in support of the single proposition upon which this application is based, they have failed to cite any decision from this Court or from any Circuit Court in support of their position.

In their original appeal, petitioners designated fourteen alleged errors in the Conclusions of Fact reached by the Trial Judge. When this case was argued in the Appellate Court only two alleged errors were argued and it was not then contended that the Trial Judge was conclusively bound by the admissions of Lytle and Pennybaker. This

latter proposition was urged for the first time upon the application for rehearing and now forms the only point that is seriously urged as a basis for the granting of the present application. In the application for rehearing before the Appellate Court and in the application for writs before this Court petitioners have been unable to show that there is any established jurisprudence which supports the belatedly alleged error.

We respectfully submit, therefore, that the application for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

Supre I, Kalford K. Miazza, a member of the Bar of the neys eme Court of the United States and one of the attorcopies for the respondents herein, do hereby certify that writ es of this brief in opposition to the application for the Benja of certiorari have been served upon Walter Carroll, ney Lamin W. Yancey, and Edward S. Bagley, 825 Whittition Building, New Orleans, Louisiana, attorneys for pe-----ners herein, by delivering same to their offices on the ---- day of September, 1956.